Supreme Court, U.S.
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No. 94-2106

In The

Supreme Court of the United States

October Term, 1995

JAMES B. MAYNARD,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

At the time of the accident, the Boiler Inspection Act, 45 U.S.C. § 23,[1] made it unlawful for a railroad "to use or permit to be used on its line" a locomotive engine that was defective and unsafe. In this action by a railroad employee who allegedly strained his elbow attempting to open a stuck engine door, the question presented is whether the engine was "in use" under the statute when the engine was parked alone on a side track with its motor off and could not be moved without a predeparture inspection that had not taken place.

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[1] Following the accident, the Boiler Inspection Act was amended and recodified by 49 U.S.C. § 20701.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Pursuant to Rule 29.1, respondent Norfolk and Western Railway Company states that it is a subsidiary of Norfolk Southern Railway Company, which, in turn, is a subsidiary of Norfolk Southern Corporation, a publicly traded company. Respondent does not have any nonwholly owned subsidiaries.

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No. 94-2106

In The

Supreme Court of the United States

October Term, 1995

JAMES B. MAYNARD,

Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner James B. Maynard ("Maynard") seeks to recover under the Boiler Inspection Act ("BIA" or "the Act") for personal injuries allegedly sustained on November 1, 1990, while working for respondent, Norfolk and Western Railway Company ("Norfolk and Western" or "the railroad"). After thorough review of the facts, both the district court and Fourth Circuit concluded that the engine in question was not "in use" on the railroad's line and that the BIA did not apply. Maynard now petitions for further review by this Court.

A determination of whether the engine was "in use" on the railroad's line at a particular time necessarily requires careful attention to the facts. In his petition, however, Maynard does not fully address the pertinent facts. Norfolk and Western therefore submits this statement to clarify the record.

On the morning in question, the engine was sitting on a "spark track" at the railroad's yard in Richlands, Virginia. A spark track is a side track where locomotives are parked when they are not being used. When an engine is on a spark track it is off the main line and not in use. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 9, 22-23; Appendix to Brief in Opposition ("Br. Opp. App.") at 2, 4.

Before Maynard arrived, the engine was unattended. Its motor was off, and it sat alone and idle on the spark track. Pet. App. at 9, 22-23.

Before taking the engine out on the line, Maynard had to make an inspection for defects. Pet. App. at 9, 11, 23-24, 44. At the time of the accident, Maynard had not made the required inspection. Pet. App. at 9, 11, 64-65, 74; Br. Opp. App. at 3-4.

If the inspection revealed any defect rendering the engine unsafe to operate, Maynard was required to report the condition to a supervisor. Pet. App. at 11; Br. Opp. App. at 3-4. Maynard was not allowed to take unsafe equipment out on the line. *Id.* If the engine could not be repaired at the site, it would be sent to a shop for repairs.

The incident occurred just after Maynard reported to work and before he had started the engine or completed

the required inspection for defects. As Maynard prepared to enter the cab of the engine, he discovered that the door was stuck. Instead of entering the cab through the other door, Maynard pulled on the stuck door with full force, allegedly straining his left elbow. Pet. App. at 64-65.

Maynard then entered the cab of the locomotive through the other door and continued with his duties. Pet. App. at 72, 74. Later that day, Maynard reported the incident to his supervisor. The supervisor took Maynard to a doctor to be examined. Pet. App. at 75. Maynard was given an ace bandage and told to return to work.

Maynard's amended complaint contained two counts. In count I, Maynard sought to recover for injuries sustained in the incident with the door. Count I was based both on the Boiler Inspection Act, which is a strict liability statute, and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, which requires proof of negligence.[2] In count II, Maynard sought to recover for other injuries allegedly sustained in different incidents after he returned to work. Count II was based solely on the FELA.

Before trial, the district court granted Norfolk and Western's motion for partial summary judgment on the BIA claim. Pet. App. at 1, 14. At trial, the jury found that the railroad was not negligent under either count I or count II, and the district court entered judgment for the railroad. Pet. App. at 16, 18. Maynard appealed. The

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[2] In count I, Maynard also sought to impose liability under the Safety Appliance Act ("SAA"), 45 U.S.C. § 11, *amended and recodified by* 49 U.S.C. § 20302 (1994). Before trial, however, Maynard abandoned his SAA claim, and the district court dismissed that claim with prejudice. Pet. App. at 6.

Fourth Circuit affirmed the judgment as to both the FELA claims and the BIA claim. Br. Opp. App. at 1-5.[3]

Maynard has filed a petition for a writ of certiorari on his BIA claim. The judgment in favor of Norfolk and Western on the FELA claims has become final.

SUMMARY OF ARGUMENT

This case turns on its facts. There are no pressing or unresolved legal issues in the case. Nor is there any conflict in the circuits. The decision is plainly right.

ARGUMENT

I THIS CASE INVOLVES THE APPLICATION OF SETTLED LAW TO THE FACTS AND THE DECISION IS PLAINLY RIGHT

This case presents no new or unresolved federal issue. Instead, it involves only the application of clear principles to the peculiar facts of Maynard's accident. Both the district court and the Fourth Circuit analyzed the facts and concluded that the Boiler Inspection Act did not apply. The fact that Maynard disagrees with their conclusion does not justify review by this Court.

An engine must be in use on the railroad's line for the BIA to apply. 45 U.S.C. § 23, *amended and recodified by*

[3] Because of errors and omissions in the reproduction of the Fourth Circuit's opinion in the appendix to the petition, respondent has appended the full opinion to this brief.

49 U.S.C. § 20701 (1994). It is uniformly recognized that the Act does not apply where an engine is undergoing maintenance, repairs, or an inspection for defects before use. *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (car not in use under SAA during inspection before departure); *Pinkham v. Maine Cent. R.R.*, 874 F.2d 875 (1st Cir. 1989) (engine not in use when placed in yard for repairs); *Steer v. Burlington Northern, Inc.*, 720 F.2d 975 (8th Cir. 1983) (train being inspected and repaired not in use); *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979) (engine being moved on service track not in use); *Tisneros v. Chicago & N.W. Ry.*, 197 F.2d 466 (7th Cir. 1952), *cert. denied*, 344 U.S. 885 (1954) (idle locomotive not in use when being readied); *Lyle v. Atchison, T. & S.F. Ry.*, 177 F.2d 221 (7th Cir. 1949), *cert. denied*, 339 U.S. 913 (1950) (idle locomotive parked at inspection pit not in use).

To be sure, factual issues arise as to when all necessary maintenance, repairs, and inspections have been completed. *Compare Angell v. Chesapeake & O. Ry.*, 618 F.2d 260 (4th Cir. 1980) (maintenance and inspection complete) *with Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (inspection not complete). But the standard for liability is well settled and requires no clarification by this Court.

In accordance with the BIA and cases interpreting it, the district court and the Fourth Circuit properly held that the engine was not in use on the railroad's line at the time of the accident. The engine was in a yard on a special track where engines are parked when they are not in use. The engine was not being operated and could not be taken out on the line until it had been inspected for

unsafe conditions. When Maynard encountered the stuck door, the engine was idle, and the inspection had not been completed. Under the facts, the district court and the Fourth Circuit properly concluded that the BIA did not apply, and reexamination of the case by this Court is not justified.

II THERE IS NO CONFLICT WITHIN THE FOURTH CIRCUIT OR AMONG THE CIRCUITS OR WITH PRECEDENT OF THIS COURT

In his petition, Maynard tries to create conflicts in the cases interpreting and applying the BIA, but none exists.

Maynard first argues that the panel's decision in this case cannot be reconciled with the Fourth Circuit's prior decision in *Angell v. Chesapeake & Ohio Ry.*, 618 F.2d 260 (4th Cir. 1980). The panel in this case, however, did not see any conflict with the court's prior decision in *Angell*. In fact, the panel in this case cited and relied upon *Angell*. Br. Opp. App. at 3-4.

In *Angell*, the court held that the BIA applied when an engine was being moved off a service track after the required maintenance and inspection had been completed. In the present case, the court determined the BIA did not apply when the engine remained idle on a spark

track and the required inspection had not been completed.[4]

Nor does the decision in this case conflict with decisions from other circuits. Rather, the Fourth Circuit found support for its conclusion in decisions from the First, Fifth and Tenth Circuits. Br. Opp. App. at 4. See *Pinkham v. Maine Cent. R.R.*, 874 F.2d 875 (1st Cir. 1989) (unit in yard for repairs not in use under BIA); *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (car not in use under SAA during inspection before departure); *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979) (engine not in use under BIA when not engaged in moving traffic).

Maynard's reliance on *Holfester v. Long Island R.R.*, 360 F.2d 369 (2d Cir. 1966), is misplaced. In *Holfester*, the unit was already in service on a live track with its lights on and motor running. Likewise, the district court's decision in *Rivera v. Union Pacific R.R.*, 868 F. Supp. 294 (D. Colo. 1994), does not help Maynard. In *Rivera*, the engine had already been checked, started, and coupled to other cars when the engineer boarded the unit.

Finally, the decision in this case does not conflict with *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10 (1938). *Brady* was decided under the SAA, which made it unlawful for a railroad "to haul, or permit to be hauled or used on its line" any car not having certain safety features. 45 U.S.C.

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[4] If the decision in this case had actually conflicted with the prior decision in *Angell*, Maynard could have sought rehearing en banc. Fed. R. App. P. 40; Local R. Fourth Cir. 35. Maynard did not do so.

§ 11, *amended and recodified by* 49 U.S.C. § 20302 (1994). In *Brady*, the railroad had already put the car out on its line when the accident occurred. Because the car was in the middle of its journey and "had not been withdrawn from use," the Court held that the SAA applied. 303 U.S. at 13. Here, of course, the engine was still on the spark track and had not been put into use when the accident occurred.

Maynard argues that as a locomotive engineer he was within the class of persons protected by the BIA. Petition at 22-23. This is no doubt true if the BIA applies. For the BIA to apply, however, the engine must be in use on the railroad's line. Maynard's engine was not, and his strict liability claim was properly dismissed.

By limiting the scope of liability to locomotives in use on the railroad's line, the BIA affords the railroad an opportunity to conduct inspections and discover defects in its engines before they begin operations. During this inspection period, a railroad is liable for negligence, but it is not strictly liable under the BIA. The Court should decline Maynard's invitation to broaden liability under the Act and the cases interpreting it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 20, 1995

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES B. MAYNARD, *Plaintiff-Appellant,* v. NORFOLK AND WESTERN RAILWAY COMPANY, *Defendant-Appellee.*	No. 94-1285

Appeal from the United States District Court
for the Western District of Virginia, at Abingdon.
Glen M. Williams, Senior District Judge.
(CA-92-163-A)

Argued: February 1, 1995

Decided: March 27, 1995

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Francis Paul Hajek, WILSON & HAJEK, P.C., Virginia Beach, Virginia, for Appellant. Richard Edward Ladd, Jr., PENN, STUART, ESKRIDGE & JONES, Abingdon, Virginia, for Appellee.

ON BRIEF: Otis K. Forbes, III, WILSON & HAJEK, P.C., Virginia Beach, Virginia, for Appellant. Wade W. Massie, PENN, STUART, ESKRIDGE & JONES, Abingdon, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

James B. Maynard, a locomotive engineer, strained his left elbow on November 1, 1990, when he tried unsuccessfully to open a stuck cab door to Locomotive 3218, owned by his employer, Norfolk and Western Railway Company. The injury occurred at the beginning of Maynard's work day when Maynard tried to enter the cab of the locomotive, which was parked on a side track. He sustained further injury during the two weeks after his elbow injury when he returned to work and strained his neck and shoulder from climbing onto locomotives while his left elbow was in a sling. Maynard sued Norfolk and Western for damages under the Boiler Inspection Act, 45 U.S.C. §23,* and under the Federal Employer Liability Act (FELA), 45 U.S.C. § 51. The district court dismissed the Boiler Inspection Act claim on Norfolk and Western's motion for summary judgment because the locomotive

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*Effective July 5, 1994, this section was modified and recodified as 49 U.S.C. §20701. Because this incident occurred in November 1990, we apply the earlier version.

was not "in use" when Maynard hurt his elbow. Following a jury trial on the FELA claim, the jury rendered a verdict in favor of Norfolk and Western. Maynard contends that the district court erred both in ruling as a matter of law that the locomotive was not in use and in instructing the jury on the FELA claim. He also contends the jury's verdict was against the weight of the evidence. We disagree and accordingly affirm.

The Boiler Inspection Act provided at the time of this incident:

> It shall be unlawful for any railroad *to use or permit to be used* on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such railroad without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

45 U.S.C. §23 (emphasis added). The Act does not impose liability on a railroad for locomotives in repair or not in use. *See Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 261 (4th Cir. 1980). In this case, Maynard had a duty to inspect the locomotive for any defects, which must be noted on Norfolk and Western's ME-60 form, as well as a duty to assure that any unsafe condition is corrected *before* putting the locomotive in use. Maynard injured

himself before he had even entered the cab of the locomotive. At the time, the locomotive was parked on a side track, dormant and unconnected to any cars. As Maynard climbed on to the locomotive, he tried to open the door to the cab with his right hand, unsuccessfully. He then tried with "full force" to open the door with his left hand, while bracing with his right hand, and strained his left elbow in the process. When that effort proved unsuccessful, Maynard went around and entered on the other side of the cab and then kicked open the stuck door from the inside. At the time of the incident the locomotive had not been inspected, the ME-60 form had not been filled out, and the locomotive had not been put into use. Accordingly, the strict liability of the Boiler Inspection Act had not yet become applicable. *See Angell*, 618 F.2d at 261-62 (train was in use when all servicing, maintenance, and repair work had been completed). *See also Pinkham v. Maine Cent. R.R. Co.*, 874 F.2d 875, 882 (1st Cir. 1989) (train not in use when en route for repairs); *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195, 1198-99 (10th Cir. 1979) (train not in use when moving interstate or foreign commerce); *cf. Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 189 (5th Cir. 1991) (train was not in use for purposes of Safety Appliance Act because the injury occurred during a predeparture brake inspection).

On the FELA claim, Maynard contends that the district court erred in refusing to instruct the jury as he requested. While the court did not instruct the jury exactly as Maynard had requested, it adequately covered the subject matter in its own form of instructions. Maynard is not entitled to have his form of jury instructions given to the jury so long as the district court adequately

instructs on the law with respect to the issues properly submitted to the jury. *See, e.g., Chavis v. Finnlines Ltd., O/Y*, 576 F.2d 1072, 1076 (4th Cir. 1978) (affirmance of the district court is required as long as the instructions, taken as a whole, fairly and adequately state the pertinent legal principles). Moreover, we note that several of the requested instructions related to damages were rendered moot by the jury's verdict for the defendant.

Finally, Maynard contends that the district court should have granted his motion for a new trial because the jury's verdict was against the clear weight of the evidence on Norfolk and Western's negligence in allowing Maynard to use a locomotive with a defective door and in allowing him to return to work with his elbow in a sling. We reject this contention. No evidence was presented showing prior knowledge by the railroad that the door was stuck, and Maynard's return to work was entirely voluntary, following advice from his personal doctor. The district court acted well within its discretion in refusing to disturb the jury's verdict.

AFFIRMED